United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-4119

No. 75-4119

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BETHLEHEM STEEL CORPORATION,

Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents

ON PETITION FOR REVIEW

BRIEF FOR RESPONDENTS

PETER R. TAFT
Assistant Attorney General

ALFRED T. GHIORZI
PATRICK A. MULLOY
Attorneys, Department of Justice
Washington, D.C. 20530

ROBERT V. ZENER
General Counsel

STEVEN SCHATZOW
Attorney, Environmental Protection Agency
Washington, D.C. 20460

WARREN H. LLEWELLYN
Attorney, Environmental Protection Agency
Region II
New York, New York

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AUTHORITIES CITED

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Statutes and Regulations

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JURISDICTION

The respondents do not believe this Court, for the reasons stated below in Part I of this brief, has jurisdiction to hear this case under Section 509(b)(1), or any other Section of the Federal Water Pollution Control Act Amendments of 1972.

ISSUES PRESENTED

1. Whether this Court has jurisdiction under Section 509(b)(1) of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1369(b)(1), to review actions taken by the Environmental Protection Agency (EPA) pursuant to Section 303 of the FWPCA with regard to the State of New York's water quality standards?

2. Whether the Environmental Protection Agency acted in accordance with the procedures set forth in Section 303 of the Federal Water Pollution Control Act when it partially approved the State of New York's submission of "Criteria Governing Thermal Discharges?"

3. Whether the Environmental Protection Agency acted reasonably and within the scope of its authority under the Federal Water Pollution Control Act when it confined its approval of the State of New York's "Criteria Governing Thermal Discharges" to only those elements of the submission which could be described as water quality standards under the 1965 Federal Water Pollution Control Act and regulations promulgated thereunder by EPA, 40 C.F.R. 120.2?

STATEMENT OF THE CASE

This petition, filed on June 23, 1975, under Section 509(b)(1) of the Federal Water Pollution Control Act, seeks review of the Environmental Protection Agency's decision of February 23, 1975, to approve under Section 303 of the FWPCA only those aspects of the State of New York's "Criteria Governing Thermal Discharges,"

as were truly water quality standards and not to consider other aspects of the submission since they were not water quality standards. EPA on July 25, 1975, moved to dismiss the petition contending that its actions in reviewing state water quality standards under Section 303 of the FWPCA were not reviewable under Section 509. This Court by its order of August 27, 1975, denied the EPA motion "without prejudice to respondents' assertion of lack of jurisdiction on hearing the said petition."

INTRODUCTION

A. The 1965 Federal Water Pollution Control Act and Actions Taken Thereunder By EPA and Its Predecessor Agencies In Regard to New York's Water Quality Standards.

In 1965 Congress enacted the Federal Water Pollution Control Act. 79 Stat. 903; (Pub. L. 89-234). Under procedures set forth in the 1965 Act, which applied only to interstate waters, water quality standards adopted by a state could become the applicable Federal Standards if:

> (1) the Governor or head of the State water pollution control agency filed by October 2, 1966, a letter of intent that the state, after public hearings, would before June 30, 1967, adopt water quality criteria applicable to interstate waters, or portions thereof within the state, and a plan for the implementation of and enforcement of the criteria (emphasis added), and
>
> (2) the Secretary [1/] determined that the state criteria and plan were consistent with the purposes of the Act. 33 U.S.C. 1160(c)(1).

In July and August of 1967, the Secretary of the Interior approved New York State's water quality criteria and plans for implementation of such criteria on interstate streams as the Federal water quality standards for New York's interstate waters (App. 27, 40). His approval was predicated upon the resolution of a few significant issues regarding criteria and plans, including the necessity to formally adopt numerical temperature criteria for the protection of aquatic life (App. 27, 40). Although New York submitted its thermal policy at that time (App. 29, 33-35), it was not until July 1969 that the State of New York actually adopted thermal criteria to govern the discharge of heat into the waters of the state, and certain rules and regulations

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1/ Reorganization Plan No. 2 which was effective May 10, 1966, transferred administration of the Federal Water Pollution Control Act, as well as most functions of the Secretary of HEW authorized by the Act to the Secretary of the Interior; Reorganization Plan No. 3, effective in July 1970, transferred the water pollution control program to the Administrator of the newly created Environmental Protection Agency.

designed to implement the criteria (App. 41-60). These were submitted to the Department of the Interior for approval as Federal water quality standards for interstate waters pursuant to the above noted provisions of the 1965 Act. The Department of the Interior, however, would not approve the New York submissions as proper standards since they contained exceptions and exemptions from the criteria in the standards and thus were not water quality standards consistent with the 1965 Act.[2/] The Department advised New York that to have acceptable thermal standards it should, inter alia, not include provisions for modifications and waivers of the standards within the standards themselves (App. 70).

During 1971, the Environmental Protection Agency, which had assumed jurisdiction of the Federal water pollution control program from the Department of the Interior, attempted to work out a resolution of the thermal standards with state authorities. A Federal thermal task force met with state

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2/ The Department of the Inteior maintained that water quality standards under the 1965 Water Act consisted of water quality criteria and a plan for the enforcement and implementation of such criteria. 40 C.F.R. 120.2.

officials (App. 75-77). In November 1971, the Regional Administrator for EPA wrote to the Commissioner of New York's Department of Environmental Conservation and noted that EPA understood that New York State "now wishes to officially revise and adopt criteria in accordance with the consensus of the Federal Thermal Task Force" (App. 76). On January 14, 1972 the Commissioner suggested that the state would delay scheduling hearings to revise the New York thermal standards, as it was understood Congress was going to revise the 1965 Act, and the expense of hearings could prove a wasteful expenditure of money if the water quality program were changed. (Attachment one, R. 271).[3/]

B. The Federal Water Pollution Control Act Amendments of 1972 and New York's Water Quality Standards.

On October 18, 1972, the Congress enacted the Federal Water Pollution Control Act Amendments (FWPCA) 33 U.S.C. 1251 et. seq. establishing new regulatory programs to combat pollution of the nation's waters. The Act, while technically amending the Federal Water Pollution Control Act of 1965, was a comprehensive statute in its own right. The new Act shifted the emphasis for enforcement purposes from water quality standards (i.e., the quality of water in a given stream) to effluent limitations (i.e., limits imposed

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3/ The Attachments to this brief are documents from the record in this case, a certified copy of the index which has been filed with this Court. They were inadvertently omitted from the appendix by the respondents and are attached hereto for the Court's convenience.

upon specific discharges). Such effluent limitations, based upon feasible pollution control technology, were to be applied to the specific discharges through permits under section 402 of the statute, the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. 1342.

The Act, however, did not do away with water quality standards, and Section 303(a)(1) and (2) of the new Act, 33 U.S.C. 1313(a)(1) and (2), specifically provided that the Administrator of EPA was to review each state's interstate water quality standards (over which he had jurisdiction prior to the 1972 Act) and intrastate water quality standards (over which he did not previously have jurisdiction). He was to let the standards for both interstate and intrastate waters remain in effect unless he

> determined that such standard(s) [were] not consistent with the applicable requirements of this Act as in effect immediately prior to the date of the Federal Water Pollution Control Act Amendments of 1972.

Pursuant to these responsibilities, the Regional Administrator notified the State of New York on January 17, 1973, that a number of the State's water quality standards

for interstate waters were in need of revisions (App. 97-100). A similar notification with regard to intrastate standards was given on March 13, 1973 (App. 159-160). With regard to the thermal standards, EPA reminded the state of the criteria which had been agreed upon by New York officials and the Federal Thermal Task Force in 1971 (App. 146-148). In May of 1973 the state indicated that it had initiated steps to comply with the EPA requested revisions and expected to promulgate them by September 15, 1973. (App. 171).

During July and August 1973, New York held public hearings on its proposed water quality standards including thermal limitations (App 218). Suffice it to say that New York did not adopt adequate water quality standards after the hearings, and EPA was obligated to promulgate proposed standards for the State on December 20, 1973. 38 Fed. Reg. 34895 (App. 22). The Agency did not, however propose standards relating to maximum temperature increases and thermal mixing zone sizes, since disposal of waste heat into the nation's waterways was receiving further study within EPA. (Attachment Two, Record 1214-1215)

On March 6, 1974, New York State submitted Parts 700, 701 and 702 of its Water Quality standards to EPA for review and approval, and on May 8, 1974, EPA approved them as adequate standards. In his approval letter to Governor Wilson, the Regional Administrator noted that "there is

only one issue in the water quality standards that remains outstanding -- that is the issue of Criteria Governing Thermal Discharges (Part 704)." (Attachment three; R. 1075-1076). He further noted that EPA was presently working with the State's Department of Environmental Conservation (DEC) in preparing a mutually acceptable thermal standard, and that he expected the efforts to be concluded in the near future. (Attachment three; R. 1075-1076).

On August 8, 1974, the State of New York submitted to EPA a document entitled "Part 704, Criteria Governing Thermal Discharges" and asked that it be reviewed and approved as the State's thermal water quality standard. (Attachment four; R. 1150). The submitted document included a number of provisions concerning thermal discharges, certain ones of which concerned the goal and appropriate criteria for insuring that the ambient water quality was suitable for maintaining a balanced, indigenous population of shellfish, fish and wildlife (App. 194-199). Such provisions of the submission (704.1, 704.2 and 704.3) were in the nature of water quality standards. As required by Section 303(a)(1) and (2), EPA reviewed these state adopted water quality standards. EPA could have either approved them or disapproved them depending on whether they met the requirements of the Federal Water Pollution Control Act. In this case EPA

approved the standards on February 23, 1975 (App. 209-210) as they were consistent with the requirements for water quality standards as set out in the Water Pollution Control Act of 1965, and EPA regulations 40 C.F.R. 120.2; that is they contained a narrative statement regarding achievement of a certain level of water quality, and the requisite criteria needed to achieve that level.

The remaining provisions of the State submission (704.4, 704.5, 704.6) were not water quality standards as required under the 1965 Act, i.e. they were not criteria relating to a specific water quality to be achieved. Rather, they contained methods by which individual dischargers could be excepted from the criteria contained in Section 704.2 of the State submission. Since they were not water quality standards, EPA had no power under Section 303(a) to either approve or disapprove them. EPA then utilized the only power it had in regard to those provisions -- it ignored them or "excluded" them from consideration as water quality standards. EPA likewise notified the State of this action (App. 209-210). Finally, the Agency published notice of its actions regarding the New York State Part 704 submission in the Federal Register on March 25, 1975 (App. 25).

ARGUMENT

I

THIS COURT DOES NOT HAVE ORIGINAL JURISDICTION TO REVIEW ACTIONS OF THE EPA ADMINISTRATOR TAKEN PURSUANT TO SECTION 303 OF THE FWPCA

Section 10 of the Administrative Procedure Act, 5 U.S.C.A. 703, provides that unless the forum of proceeding for judicial review is specified by statute, any applicable form of legal action shall be brought "in a court of competent jurisdiction." This Court and others have held that Courts of Appeal are not "courts of competent jurisdiction" for original actions brought under the APA. Rettinger v. Federal Trade Commission, 392 F.2d 454, C.A. 2, 1968, In Re Board of Broward County, Florida, 475 F.2d 1117, C.A. 5, 1973. Thus, unless the Federal Water Pollution Control Act grants this Court original jurisdiction, this petition must be dismissed.

The Petitioner alleges, however, that this Court has original jurisdiction to review the Administrator's actions taken pursuant to Section 303 of the FWPCA, under Section 509(b)(1)(E) of that Act. That Section provides that review of the Administrator's action

> in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306 [of this Act] . . . may be had by any interested person in the Circuit

> Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon the application by such person. Any such application shall be made within ninety days of such determination, approval, . . .

It is clear from reading this Section of the statute that it makes no provision for original appellate court review of actions taken by the Administrator pursuant to Section 303 of the Act.

A. A Water Quality Standard is Not an Effluent Limitation and Cannot Be Reviewed Under Section 509(b)(1)(E) of the FWPCA.

Not to be stymied by the plain meaning of the statute, the petitioners make an ingenuous argument to suggest that this Court's jurisdiction to review the actions of the Administrator in approving state water quality standards under Section 303 of the Act, is still provided for under 509(b)(1)(E) because a water quality standard is really an effluent limitation. This argument, attempting to equate water quality standards provided for in Section 303 of the Act, with effluent limitations provided for in Section 301, 302 and 306 has to be based on a complete misinterpretation of the background, philosophy, policy, and statutory language of the 1972 Amendments to the Federal Water Pollution Control Act.

The United States Court of Appeals for the Eighth Circuit in CPC International v. Train, 515 F.2d 1032, 1034-1036 (1975), analyzed some of the changes made in the 1965 Federal Water Pollution Control Act by the Amendments adopted in 1972. That court noted that the 1972 Amendments restructured the whole Federal program for water pollution control. It noted that the 1972 Amendments were

> enacted against a background of frustration and ineffectiveness in controlling the quality of the nation's waters. The keystone of the pre-1972 program had been the setting of water quality standards for interstate navigable waters. Under that program, if wastes discharged into receiving waters reduced the quality below permissible standards, legal action could be commenced against the discharger (p. 1034).

The Court noted that to establish that a given polluter had violated the Federal water quality standards

> a plaintiff had to cross a virtually unbridgeable causal gap of demonstrating that the cause of the unacceptable water quality was the effluent being discharged by the defendant. (p. 1035)

The enforcement mechanism of the pre-1972 Act, the Court noted

> was so unwieldy that only one case had reached the courts in more than two decades. See S. Rep. No. 92-414, 92nd Congress, 1st Session (1971), reported in a Legislative History of the Water Pollution Control Act Amendments of 1972 at 1423 (1973) (p. 1036). (Hereafter Legislative History).

The Amendments of 1972 brought about a major change in the enforcement mechanism by shifting the focus from water quality standards to effluent limitations. The Court in CPC International stated at 1036 that the Act now

> provides in §301(a) that the discharge of any pollutant is unlawful unless it is in compliance with conditions (effluent limitations) contained in a permit issued under §402. Permits are to be issued by EPA or by those states whose permit programs have been approved by the EPA pursuant to §402(a)(5).

The Fourth Circuit in analyzing the 1972 Amendments in Dupont v. Train, 8 ERC 1506, 1507 (1975) agreed with the above analysis. It noted that

> It should be kept in mind that the 1972 amendments changed the emphasis in the statutory scheme of water pollution control from that of regulating the quality standard of the body of water involved to regulating not only the water quality but also the quality of the effluent discharged into the body of water.

The major emphasis of the 1972 Amendments, therefore, was the development of a separate, though related system of water pollution control - effluent limitations. Effluent limitations are defined in Section 502(11) of the Act:

> The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of physical, biological and other constituents which are discharged from point sources into navigable waters . . . including schedules of compliance.

Sections 301, 304 and 306 of the Act establish on the basis of technology, the amount of pollutants which can be removed from a facility's effluent. Section 303 focuses on the quality of the receiving waters into which the effluents are being discharged.[4/]

The FWPCA never equates water quality standards with effluent limitations. Rather, the latter are designed to achieve the former. If Congress had, as petitioner claims, intended to equate the two terms it could have done so as it had many occasions to relate the two terms in the judicial review provisions of the Act and elsewhere if it had wished to do so. But it never mentioned Section 303 water quality standards in either Section 509(b)(1)(E) authorizing review of certain actions by the Administrator

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4/ The water quality standards (i.e. use classifications and criteria for reaching these uses) form the basis for specific permit conditions only if the technology based limits are insufficient to achieve the level of water quality required for a particular stream segment. See Section 301(b)(1)(C). That provision provides for the achievement of "any more stringent limitations, including those necessary to meet water quality standards . . . ." The more stringent limitation is not the water quality standard, but is rather a limitation based upon a water quality standard which can be imposed on a discharger in his Section 402 permit. Of course, the imposition of such an additional limitation in addition to the technology based limitations would be reviewable in the Court of Appeals in the context of a request for review of a permit issued under Section 402, which is provided for in Section 509(b) of the Act.

in the United States Courts of Appeal. Nor did it mention Section 303 in Section 505 of the Act which authorizes citizen suits, 33 U.S.C. 1365. In the latter section of the Act the term "effluent standard or limitation under the Act" is defined by reference to numerous applicable sections of the Act - 301, 302, 306, 307, 401, 402 and 313. However, just as in Section 509(b)(1)(E) there is no reference to Section 303 water quality standards as effluent limitations.[5/]

The petitioner's attempt to merge review of Section 303 water quality standards into Section 301 is without foundation. In its brief it states that the Act clearly contemplates such a merger (p. 8), yet cites no statutory language or legislative history in support of the contention.

5/ It should be noted that water quality standards set allowable levels for concentrations of pollutants in receiving waters depending on their designated use, e.g. "the maximum concentration of cyanide in waters designated for protection and propagation of fish cannot exceed .005 parts per million." On the other hand effluent limitations restrict the total amount of pollutants a given discharger may emit, e.g. an NPDES permit for a steel plant might limit the "discharge of cyanide to a one day maximum loading of .4689 pounds per 1,000 pounds of product." This effluent limitation is taken from the guidelines promulgated for permit issuance in the iron and steel industry. 40 C.F.R. 420.52. For a further discussion of the distinction between the two, i.e. water quality standards and effluent limitations see then Administrator Ruckelshaus' testimony on the original Senate bill S. 2770 in a Legislative History of the Water Pollution Control Act Amendments of 1972 at pp. 1182-83 (1973).

The petitioner further reveals a misunderstanding of the relationship between Sections 301 and 303 of the Act when it complains that the New York water quality standards approved by EPA fall in an area where "EPA has not established any limitations or guidelines of its own" (Br. 8). The petitioner appears to suggest that EPA should have developed "limitations" or "guidelines" for thermal water quality standards. But EPA cannot promulgate national thermal water quality standards.

EPA, it should be noted, is involved in the consideration and control of thermal pollution in two separate and distinct processes. First, EPA, pursuant to Sections 301, 304 and 306 of the Act, develops national effluent limitation regulations for specific categories of industry, based upon "best practicable" and "best available" technology for control of pollutants.[6/] For industries which produce substantial amounts of heated discharges, such as the steam electric industry, the EPA promulgated effluent limitations to be included in permits issued to such discharges. Such limitations are subject to original appellate court review under 509(b).[7/]

6/ Heat is listed by Congress as a pollutant under Section 501(b) of the Act.

7/ Several cases involving these sort of limitations for permit issuance for given industries are now before this Court. Hooker Chemical and Plastics Corporation, et. al. v. Train (C.A. 2, 74-1683); NRDC v. EPA (C.A. 2, 74-1258); Amstar Corporation v. EPA (C.A. 2, 74-1830). EPA's effluent limitations for the steam electric industry have been challenged in the Court of Appeals for the Fourth Circuit. Appalachian Power Company, et al. v. Train, C.A. 4, No. 74-2096 and related cases.

Secondly, EPA does publish guidance documents to assist the states in developing proper criteria including thermal criteria for their water quality standards (App. 102-143). Under Section 303 EPA then reviews state submitted standards to make sure they are consistent with the Act.

B. EPA "Approves" Effluent Limitations Under Sections 301, 302, and 306 of the Act.

The petitioner has suggested (Br. 11-12) that the use of the term "approving" in Section 509(b)(1)(E) of the Act must refer to Section 303 of the Act, even though not mentioned, because the Administrator does approve water quality standards under Section 303, but does not "approve" effluent limitations under Sections 301, 302, and 306.[8/] We suggest, however, that approval is inherent in all three sections of the Act listed for original review in this Court. For example,

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8/ The petitioner's bifurcation of review argument on p. 12 of its brief does not make sense. If this Court accepted the petitioner's thesis the action of the Administrator in approving water quality standards would be reviewable in this Court under 509(b). However, if he "disapproved" the State submitted standards his actions would not be covered by 509(b) and thus could not be reviewed in this Court, but would rather be reviewed in the District Courts. This, of course, shows the falacy of the petitioner's "approval" argument, and would result in the bifurcation of review over which petitioner claims concern (Br. 12).

Section 301(d) provides that, "any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedures established under such paragraph." Obviously, if the Administrator revises the effluent limitations under this paragraph, he promulgates new effluent limitations. But, if the Administrator determines not to revise the existing effluent limitations, he must approve the existing limitations.

Section 306(b)(1)(B), providing for new source performance standards states that "the Administrator shall, from time to time, as technology and alternative change, revise such standards following the procedure required by this subsection for promulgation of such standards." If the Administrator proposes to revise such standards, and subsequently, after opportunity for comment, determines not to revise new source standards, he must approve the existing new source standards.

Section 302 provides that the Administrator may establish water quality related effluent limitations for a point source or group of point sources. Under this section the Administrator must propose an effluent limitation and hold a public hearing. Under section 302(b)(2), if a person affected by such limitation demonstrates that:

> there is no reasonable relationship between the economic and social costs and the benefits to be obtained . . . such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.

If no such showing is made, however, the Administrator approves the effluent limitation he has already developed.

It can thus be seen that the term "approved" can be applicable to effluent limitations under sections 301, 302 and 306, thus removing the ambiguity suggested by the petitioner. Thus, there really is no statutory basis for the petitioner's claim for original appellate court review of the Administrator's 303 actions under Section 509(b)(1)(E).

C. There Is No Policy Basis for Court of Appeals Review of Section 303 Water Quality Standards.

Just as there is no statutory basis for the petitioner's claim for original appellate court review of the Administrator's 303 actions under Section 509(b)(1)(E), so is there no policy basis for such review. The policy considerations discussed in the Legislative History (p. 1503) which argue for prompt and consolidated appellate review of sections 301, 304 and 306 effluent limitations applicable nationally to a given industry do not apply with the same force to a state water quality standards program. Actions under section 303 involve individual examination and designation of particular

segments of water for specified uses. Varying water temperature, rates of flow, characteristics of natural biological communities, the number of dischargers and so forth may all be taken into account. The emphasis is on particularized uses and conditions, not on nation-wide uniformity.

D. Other Cases Support the Propriety of District Court Review of Water Quality Standards.

Although the question of jurisdiction to review the Administrator's decision regarding state water quality standards has not been judicially determined, the propriety of District Court review is suggested by three other cases involving water quality standards presently under consideration in United States District Courts. See Commonwealth of Kentucky v. Train (E.D. Ky. 74-16); Associated Industries of Alabama, Inc. v. Train (N.D. Ala. 75-M0092 M), and Peabody Coal Co. v. Ravan (W.D. Ky. C75-00970(G)). Two other cases challenging water quality standards brought in United States Courts of Appeals were dismissed by stipulation on jurisdictional grounds. See Peabody Coal Co.v. EPA (5th Cir. 75-4189), dismissed August 11, 1975, and Peabody Coal Co. v. EPA (6th Cir. 75-1288) dismissed August 1, 1975.

E. Section 505, the Citizen Suit Provision of the FWPCA, Provides For Review of the Petitioner's Grievance in the Appropriate United States District Court.

Section 505(a)(2) of the FWPCA, 33 U.S.C. 1365(a)(2) provides that:

> any citizen may commence a civil action on his own behalf -- (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.
>
> The District Courts shall have jurisdiction . . . to order the Administrator to perfcrm such a duty . . . .

This provision appears to provide a forum for redress for all of the petitioner's grievances in this case. Petitioner complains that the Administrator failed to propose thermal water quality standards for the State of New York as mandated by statute, (Br. 14), failed to publish any final thermal water quality standards for New York as mandated by statute, and failed to either approve or disapprove some of the thermal discharge provisions submitted by the State of New York (Br. 19). Petitioner's argument, therefore, is that the Administrator has failed to perform his duty under the FWPCA. Even by petitioner's characterization of its own case, the statutory remedy explicitly provided by the Act is in the United States District Court, not in this Court.

Thus, the conclusion that this Court does not have jurisdiction to review the actions taken by the Administrator in regard to state water quality standards is supported

by numerous authorities: (1) the plain meaning of Section 509(b)(1)(E) of the FWPCA; (2) the provision for District Court review under Section 505; (3) the legislative history of the 1972 amendments to the FWPCA; (4) the forums chosen by other petitioners seeking review of similar actions, and (5) the lack of public policy considerations for review in this Court. Against the weight of these arguments, petitioner has presented only its confused, unsupported conclusion that water quality standards are effluent limitations under section 509(b)(1)(E).

F. Petitioner's Failure to File Its Petition For Review Within the Statute of Limitations Set Out in Section 509(b)(1) Deprives This Court of Jurisdiction.

Even assuming arguendo that this Court had original jurisdiction in this case under section 509(b)(1)(E), petitioner's failure to file within the express time limits provided in the statute has deprived this Court of jurisdiction. Section 509(b)(1) states that:

> Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

Petitioner argues that EPA's action was an approval under section 509(b)(1)(E). EPA approved New York's thermal water quality standards by letter from EPA to the State of New York dated February 23, 1975 (App. 209). Petitioner did

not file its petition for review until June 23, 1975, 120 days after EPA approved New York's standards.

While petitioner does not address this issue in its brief, petitioner does appear to admit the validity of the February 23 approval date. "On February 23, 1975, EPA advised New York of its decision (App. 209-210). . . . These conclusions were subsequently published in the Federal Register on March 25, 1975 (App. 25-26)." (Petitioner's Brief, p. 17).[9/]

It may be that petitioner did not have actual or official notice of EPA's action until EPA published a notice of approval in the Federal Register on March 25, 1975. That notice, however, contained this statement: "The EPA approved these portions of part 704 on February 23, 1975." (App. 26). Therefore, in keeping with the requirements of the FWPCA, petitioner still had 60 days after receiving official notice to prepare its Petition for Review. Petitioner can hardly claim lack of time to prepare and file such Petition.

9/ In its statement of the case, petitioner refers to "EPA's promulgation, on March 25, 1975." (Br. 2) But as petitioner subsequently admits, "EPA did not promulgate standards for New York." (Br. 18) Following petitioner's argument, therefore, since EPA did not promulgate under 509(b)(1)(E), EPA approved under that subsection. And the 90-day period begins on the date of approval -- February 23, 1975.

The ninety (90) day limitation from the date of approval is specifically required by statute and was intended by Congress to provide a strict limitation on Court review. The Sixth Circuit Court of Appeals reviewed and affirmed this Congressional intent in Peabody Coal Company v. Train, 518 F.2d 940 (C.A. 6, 1975) when it noted at pp. 942-945 that

> The legislative history of this Act shows that Congress desired a clear and prompt time schedule for application for judicial review. S. Rep. No. 92-414, 92d Cong. 2d Sess., 1972 Code Cong. and Admin. News, pp. 3668, 3750-51. The judicial review provisions as originally drafted in both H.R. 1186 section 509 and S. 2770 section 509 provided for a 30-day time limit in which to file a petition for review. In the final version the time limit was extended to 90 days, but the emphasis upon a specific time limitation remained.

In the Peabody case, EPA notified the Governor of Ohio by letter dated March 11, 1974, of its approval of the State's assuming control of the Section 402 NPDES permit program. Notice of the Administrator's action was not published in the Federal Register until July 16, 1974. The petitioners wished to contest the Administrator's approval of the State program, and since such review was specifically provided for in Section 509(b) of the statute they filed a petition for review. The Court dismissed it as untimely even though filed on the 92nd day after the Administrator's action. The Court noted that

> . . . what is sought from us is a judicial amendment of the statute to substitute the date of publication in the Federal Register for the date of approval as chosen by Congress. This invitation we decline. Peabody Coal Co. v. Train, supra p. 942.

This Court has recently cited the Peabody case with approval when it dismissed an untimely filed petition for review of an EPA issued Section 402 discharge permit in the case of Sun Enterprises, et al. v. Train, Nos. 75-6068 and 75-4164 (C.A. 2, decided March 12, 1976). Since the petition for review in that case was filed after the ninety days provided for in Section 509(b) of the FWPCA, this Court dismissed it.

Thus, even if this Court should decide that it had jurisdiction over the petitioner's claim for review of the Administrator's action pursuant to Section 303 of the Act, the petition would still have to be dismissed because it was untimely filed.

II

EPA CARRIED OUT THE INTENT OF THE FWPCA IN WORKING WITH NEW YORK TO UPGRADE ITS WATER QUALITY STANDARDS. ANY DELAY BY EPA IN OBTAINING APPROVABLE STANDARDS FROM THE STATE WAS REASONABLE, DID NOT INJURE PETITIONER AND CANNOT BE EFFECTIVELY REMEDIED AT THIS TIME

The petitioner (Br. 13-15) alleges that EPA violated its duties under Section 303 of the FWPCA by failing to either

approve all of New York's water quality standards within the statutory deadline or to promulgate Federal standards for the State's inter and intra state waters by that date.

Pursuant to Section 303(a) of the Act, EPA did notify the State on January 17, 1973, that a number of the State's water quality standards for interstate waters were inconsistent with the applicable requirements of the Federal Water Pollution Control Act. (App. 97-100). Similar notification with regard to interstate waters was given on March 13, 1973 (App. 159-160).[10/] EPA also urged the State to move expeditiously to adopt the required revisions to its inter and intrastate water quality standards and set forth the statutory time table for federal action if State action were not forthcoming (App. 146-148). In May of 1973, EPA again urged New York to revise its standards expeditiously (App. 167)

10/ In that letter EPA noted that the State would have at least 310 days to adopt necessary revisions before EPA would promulgate standards for the State. This involves 90 days after notifying the Governor or State agency of inadequacies in existing standards. Then EPA was to promptly propose standards. (EPA interpreted "promptly" to mean within thirty days.) Then the State was to have another 190 days to bring its standards into compliance before EPA was required to promulgate standards.

and both the Governor and the Department of Environmental Conservation responded that discussions regarding revisions of the standards were achieving "positive results" (App. 170) and that "New York has initiated steps necessary to comply with revisions to its water quality standards as requested in your letters to Governor Rockefeller of January 17 and March 13, 1973" (App. 171).

On June 8, 1973, New York in a letter to EPA committed itself to propose the needed revisions to its water quality standards by June 30, to have public hearings on the revisions in July, and to promulgate the standards by September 15, 1973. (App. 171-173). During July and August 1973, New York proceeded to hold public hearings on its proposed water quality standards including thermal criteria. As the report of the Hearing Officer discussed, the central issue regarding all the proposed standards was "not the fact that there must be certain waters for drinking, for recreation, and for other activities, but rather what parameters and what limits are necessary to guarantee that these uses are protected. (App. 218)."

Since the State had committed itself to promulgate state standards which would satisfy the EPA concerns, EPA can hardly be faulted with delaying its own proposal of standards for the State when the suggested time frame for such proposal came in mid-July of 1973. EPA realized that its

precipitate action could be costly by creating duplicative hearings and could jeopardize good Federal/State relations within the Region and interfere with the intent of Section 101(b) of the Act, 33 U.S.C. 1251(b) which provides that:

> It is the policy of Congress to recognize preserve and protect the primary responsibilities and rights of states, to prevent, reduce and eliminate pollution . . . and to consult with the Administrator in the exercise of his authority under the Act.

Furthermore, the House Committee on Public Works report on Section 303 of the Act indicated that:

> The Committee expects the Administrator to work closely with the states to obtain approved standards before he promulgates standards for such waters. Legislative History, p. 792.

When it became evident that the State was clearly in default of its commitment to promulgate standards, EPA fulfilled its statutory obligation and proposed water quality standards for the State on December 20, 1973 (38 Fed. Reg. 34897, (App. 24). Even then it did not propose criteria for thermal standards because that whole question was receiving further study by the Agency (Attachment 2, R. 1215).

Since EPA did not propose thermal criteria, the Agency could not have promulgated them within 190 days after December 7, 1973. Thus, EPA did not violate any "mandatory statutory deadline of the Act" as suggested by the Petitioner.

The harshest charge which can be leveled at EPA is that it failed to act "promptly" in not proposing thermal criteria as required by the Act. We suggest, however, that EPA's failure to propose thermal criteria for the State of New York's water quality standards was reasonable and compatible with the spirit of the FWPCA. It is the clear intention of the Act that the States shall have the primary responsibility for the development of water quality standards under section 303. The statute provides the States with numerous opportunities to develop standards which will be consistent with the Act and acceptable to the Agency. After notification that its standards are inadequate, the State has 90 days to submit revised standards before EPA is to begin the process of preparation of proposed water quality standards for a state [Section 303(a)]. Even after EPA has proposed water quality standards for a state, the State has 190 days to adopt acceptable water

quality standards [section 303(b)(2)]. As the record clearly shows, EPA and its predecessor agencies during a period of more than seven years constantly communicated their concerns to the State of New York and attempted to secure development of a State standard which would be consistent with the Act. EPA and its predecessor agencies were assured on numerous occasions by the State that acceptable standards were forthcoming. (See App. 27, 40, 61-70, 73, 75, 85, 97-100, 159-160, 162, 180-181, 187, and 191). In failing to publish and promulgate its own thermal standards for New York, but continuing to seek a more amicable resolution, EPA was following the mandate of Section 101(b).

The delay in EPA's approval of New York thermal water quality standards, while perhaps unfortunate, caused no injury to petitioner. Petitioner, in fact, makes no claim that it has been injured by the nine-month delay.[11/] The "intolerable situation" to which petitioner refers (Br. 15) is completely unrelated to the delay in EPA's approval.

11/ As suggested earlier if petitioner felt that it was being injured by EPA's failure to act, it could have brought suit under section 505(a)(2) in the United States District Court.

And yet petitioner suggests "on this ground alone, this matter should be remanded to EPA for action consistent with the FWPCA." (Br. 15) It is intriguing to speculate what action petitioner would require from the Agency to cure the delay problem. Should the Agency "back-date" its approval of the New York thermal criteria to July, 1974? Should the Agency be forced to promulgate its proposed standards of December 20, 1973, which according to petitioner contained no provisions whatsoever relating to thermal discharge? (Br. 4) Should the Agency be required to re-institute a new negotiating process with the State of New York? From these questions, it is clear that petitioner's claim in this respect is simply unintelligible.

Petitioner's reliance upon National Resources Defense Council, Inc. (NRDC) v. Train, 510 F.2d 692 (C.A.D.C. 1974) is misplaced. Petitioner has misinterpreted the holding in that case and its applicability in this situation. NRDC v. Train stated that EPA can be required to meet a mandatory statutory deadline, and that a suit to force EPA to act should be brought in the United States District Court not in the United States Court of Appeals. If EPA had ultimately failed to act in regard to the New York standards, a citizen suit under section 505(a)(2) to force EPA to act might be

appropriate.[12/] Now that EPA has taken action, albeit after some delay, it can serve no purpose to require EPA to act more rapidly retrospectively.

III

IT WAS BOTH REASONABLE AND LAWFUL FOR EPA TO APPROVE ONLY THOSE ELEMENTS OF NEW YORK'S SUBMISSION ENTITLED "PART 704 - CRITERIA GOVERNING THERMAL DISCHARGES" WHICH WERE PROPERLY CONSTITUENT ELEMENTS OF A WATER QUALITY STANDARD UNDER THE FWPCA AND APPLICABLE REGULATIONS PROMULGATED THEREUNDER

The petitioner argues that EPA's decision to exclude from its consideration elements of New York's submission "Part 704 - Criteria Governing Thermal Discharges" was arbitrary and capricious, contrary to the procedures dictated by the FWPCA and resulted in the "emasculation" of New York's thermal water quality standards. (Br. 15-19). This whole argument is premised on the petitioner's misunderstanding as to what constitutes a state water quality standard which is subject to EPA review under Section 303(a) of the Act.

12/ It is also interesting to note that the Court of Appeals stated on p. 711 of its opinion that even if they accepted NRDC's position that the statute required publication of all effluent guidelines by December 31, 1974, the Court "would have to allow some leeway for modification of the deadline when circumstances precluded the formulation of adequate guidelines by that date." In this case EPA, as explained above did not propose thermal criteria "promptly" when the State failed to do so, because it felt the matter needed further study. Since they were never proposed they never fell under the one hundred and ninety day limit for promulgation set in Section 303(b)(2) of the Act.

A. Numerical Criteria Are a Necessary Component of Water Quality Standards.

As noted above, Section 303(a)(1) and (2) of the FWPCA required EPA to review previously adopted state water quality standards applicable to both interstate and intrastate waters to determine their consistency with the applicable requirements of the Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Section 10(c) of the prior Act, 79 Stat. 903, required that states wishing to have Federally approved water quality standards needed:

> (A) water quality criteria applicable to interstate waters or portions thereof within such State, and
>
> (B) a plan for the implementation and enforcement of the water quality criteria adopted.

In carrying out his functions under the 1965 Act, the Secretary of the Interior required states to classify waters for uses consistent with protecting the public health and welfare and enhancing the quality of water. Some waters were classified for swimming, others for boating, others for agricultural uses, etc. For each use certain criteria for meeting such uses were to be applied, along with a plan for achieving those criteria. "Guidelines for Developing or Revising Water Quality Standards" (App. 102-144). Section 303(c)(2) continues this requirement under the 1972 Act by demanding that

> revised or new water quality standards shall consist of the designated uses of the navigable waters involved, and the water quality criteria for such waters based upon such uses. (emphasis added)

Given the lengthy history of the development of the numerical criteria found in Part 704.2 of New York's submission, starting with New York's Technical Bulletin No. 36 (App. 33-35) and the many studies upon which those criteria were based, including the recommendations of the Federal Thermal Task Force which studied the problem at great length (App. 146-148), it is clear that the numerical criteria in Part 704.2 represent the best technical judgment as to the temperature changes which various waters can undergo and still be suitable for certain designated uses. They must be considered an essential part of any water use designation which requires thermal criteria to maintain or attain such use.

Even the petitioners do not dispute that the numerical criteria found in Part 704.2 of the New York State submission constitute an essential element of water quality standards, at least when those numerical criteria are applied to new or modified sources.

B. Limitations on the Applicability of Criteria Needed to Attain a Certain Use Classification Cannot Be Considered Part of a Water Quality Standard and Thus Part 704.6 Could Not be Approved. 13/

An exemption from the criteria for certain discharges based upon age of discharging facilities cannot logically or legally be a part of a water quality standard. The criteria in Part 704.2 of the New York submission describe general and specific (numerical) standards to which the ambient water must conform. Part 704.6 does not provide exemptions from these criteria based on special, local ambient conditions in a receiving water body, but rather grants exemptions across the board to facilities of a certain age. However, there is no logical relationship between the age of a discharging facility and the potential impact of its discharges on the ambient conditions in the

---

13/ EPA approved Parts 704.1 (the narrative standard), 704.2 (criteria for that standard) and 704.3 (the mixing zone criteria) but it could not and did not approve Parts 704.4 (additional limitations and modifications on the first three parts), 704.5 (design requirements for water intake structures) and 704.6 (limitations on the applicability of the criteria in 704.2 based on the age of the facility discharging into the water). See App. p. 194-200 for the content of each of these Parts. The petitioner does not seem to be concerned with the fact that EPA did not approve Parts 704.4 and 704.5. The rationale for exempting them from consideration is considered in detail in the preamble to the March 25, 1975 Federal Register publication (App. 25).

receiving water body. If, for example, a 90° surface temperature is a relevant criteria for waters designated non-trout but still suitable for fish and wildlife (App. 195) this temperature would be the specified ambient criteria to be met regardless of whether the discharge potentially affecting this condition were of recent or "ancient" (pre-1969) origin.

If the exemption from criteria provided in Part 704.6 cannot logically be related to the achievement of any ambient water quality standard, then why was it included in New York's submission? New York State contends it was put in to avoid "unnecessary burdens on the New York utility industries existing plants." (App. 205) While this goal is not an unreasonable one, the FWPCA itself provides an acceptable mechanism for exempting particular thermal discharges from unnecessarily stringent thermal effluent limitations whether such limitations are derived from the application of water quality standards or from industry wide discharge limitations. That mechanism is set forth in Section 316(a) of the Act, and will be discussed below. In its rather sophistic argument, the petitioner has accused EPA of "emasculating" the New York themal standards. (Br. 15) EPA, however, has done nothing more than decide that exceptions to a standard can not be part of the standard. The Federal Act provides

for exceptions, and the framework in which they are to be granted. Section 316(a). It is interesting to note that the State of New York has not joined the petitioner in its cry for redress of grievances, nor have the utility companies which would benefit most if the Part 704.6 "exception or grandfather clause" could be considered part of a water quality standard. One might assume that they are satisfied with the exemption procedure provided for by the Federal Act.

IV

ASSUMING ARGUENDO THAT PART 704.6 OF NEW YORK'S THERMAL CRITERIA SUBMISSION CAN BE CONSIDERED AS A LEGITIMATE PART OF A WATER QUALITY STANDARD, IT IS STILL INCONSISTENT WITH THE FWPCA AND WOULD HAVE TO BE DISAPPROVED

Even assuming, for the sake of argument, that the Part 704.6 "grandfather or exception clause" is a legitimate part of a water quality standard, the procedures for exceptions from criteria provided therein are inconsistent with the requirements of Section 316(a), the exceptions procedure in the Federal Act, and would have to be disapproved from being part of the New York water quality standard. Section 303(g) of the FWPCA, 33 U.S.C. 1313(g), requires that "Water quality standards relating to heat shall be consistent with the requirements of Section 316 of this Act."

Section 316 provides relief from effluent limitations otherwise applicable to a source's thermal discharges:

> Whenever . . . any such source . . . can demonstrate to the satisfaction of the Administrator (or if appropriate, the State) that any effluent limitation proposed . . . [is] . . . more stringent than necessary to assure the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife in and on the body of water into which the discharge is made.

The most relevant aspect of the section 316(a) mechanism to this case is that it places an initial "burden of demonstration" upon a source before it can secure a less stringent effluent limitation. Section 316(a) clearly requires a source to meet water quality standards and criteria applicable to the water into which it is discharging, unless it can show that meeting such criteria is not necessary for assuring the protection and propagation of the indigenous species required for a balanced aquatic environment in such waters. The procedures for securing such exceptions are spelled out in 40 C.F.R. 122 (39 Fed. Reg. 36175-36184, October 8, 1974). These procedures provide that the exception procedure can be invoked as part of the NPDES permit application process provided for in Section 402 of the Act.

Part 704.6 of the New York State submission completely reverses the "burden of demonstration", provided for in Section 316, with respect to all pre-1969 thermal discharges

by requiring the State Commissioner to have "reason to believe" that such a thermal discharge is violating the narrative standard of Part 704.1 before he can require complicance with the numerical criteria provided for in Part 704.2 of the standard (App. 200). Of course, this shifting of the "burden of demonstration" is the real dispute which petitioners have with EPA's action. The shift of the burden to the State is not consistent with Section 316 of the Act. As noted Section 303(g) of the Act requires that water quality standards relating to heat be consistent with Section 316. Since Part 704.6 is clearly not consistent with the "burden of proof" requirement of Section 316, EPA can not and could not approve it as part of a satisfactory water quality standard. Congress in passing Section 316(a) of the Act set forth the procedure and burden of proof which it determined was necessary to protect the aquatic environment from the effects of heat.[14/] Neither EPA nor the State of New York is empowered to thwart this congressional mandate.

14/ Congress specified heat as a pollutant in Section 502(b) of the Federal Water Pollution Control Act, 33 U.S.C. 1362(6). The dramatic effects of thermal pollution upon the acquatic environment are well documented. See Peter A. Krenkel and Frank L. Parker, editors, Biological Aspects of Thermal Pollution, Vanderbilt Universtity Press, 1969. In that well-known reference work, the authors conclude that discharges of heat have injured the acquatic environment in ways ranging from the obvious (killing fish) to the subtle (e.g. altering species composition, and increasing susceptibility to disease, predation, and other pollutants). Any large scale modification of the thermal regime of rivers and lakes will change the aquatic environment, usually for the worse.

Part 704.6 is thus inconsistent with Section 316(a), and with Congress' whole purpose in maintaining water quality standards with numerical criteria as the measure for determining that water is suitable for specified uses. Part 704.6 would grant a blanket exception to pre-1969 plants from the numerical criteria in violation of the Act's whole thrust and in violation of Section 316(a). Thus even if part 704.6 were considered as a water quality standard requiring disapproval or approval, it would be disapproved by EPA as inconsistent with the FWPCA. EPA wishes to emphasize its position on this point. Petitioner asks this court to remand the thermal standards "for action consistent with the Federal Water Pollution Control Act." (Br. 19) If this Court did order such a remand, and EPA were ordered to consider part 704.6 as a water quality standard, EPA would disapprove it as inconsistent with the Act. Since the thermal standards which EPA has approved (parts 704.1, 704.2 and 704.3) provide an adequate package of state thermal water quality standards, EPA would not promulgate additional thermal standards for the State of New York. Assuming petitioner brought another action in the proper forum to challenge EPA's disapproval, that Court would subsequently be forced to decide whether part 704.6 - as a water quality standard - is consistent with the Act.

Therefore, should this Court decide that it has jurisdiction and that part 704.6 is a water quality standard which

EPA must either approve or disapprove, respondents urge that this Court also rule that part 704.6 is inconsistent with the Act and that EPA acted within its discretion in not approving it as part of New York's thermal water quality standard. To do otherwise would merely prolong this frivolous litigation.

V

THE STANDARD OF REVIEW IN THIS CASE IS WHETHER THE ADMINISTRATOR ACTED ARBITRARILY, CAPRICIOUSLY OR OTHERWISE ABUSED HIS DISCRETION OR ACTED CONTRARY TO LAW IN NOT CONSIDERING PARTS 704.4, 704.5 AND 704.6 OF NEW YORK'S THERMAL SUBMISSION AS LEGITIMATE PARTS OF A WATER QUALITY STANDARD UNDER THE FWPCA.

The petitioner's grievance is essentially that EPA erred in its interpretation of what constitutes a water quality standard for purposes of Section 303 of the FWPCA. If this Court decides that it has jurisdiction to reach this question, despite the jurisdictional limitations provided in Section 509(b) of the Act, we believe that EPA's decision must be upheld under the applicable standard of review.

The respondent Environmental Protection Agency is in basic agreement with the petitioner's contention (Br. 18) that the standard of review in this case should be whether or not the actions of the Administrator in not considering Parts 704.4, 704.5 and 704.6 of New York's thermal criteria as water quality standards were "(A) arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law . . . [or] (C) in excess of

statutory jurisdiction, authority or limitations . . . [or] without observance of procedure required by law. Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 706.

As interpreted by the Supreme Court in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971), under this standard the reviewing court must decide (1) whether the Administrator acted within the scope of his authority, (2) whether the decision was based on a consideration of the relevant factors, and (3) whether there has been a clear error of judgment. It has been repeatedly emphasized by the Supreme Court that although judicial review is to be "searching and careful, the ultimate standard is a narrow one" and "the Court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, supra, at 416.

Petitioners have the burden of proving that the administrative action taken by the agency in relation to New York's thermal criteria submission was improper as reflected by the record upon which the agency took its challenged actions. Citizens to Preserve Overton Park v. Volpe, supra and authority cited therein.

The reviewing Court in deciding whether the agency acted properly may not substitute its judgment for that of the agency and the Court must acknowledge and give weight to the agency's expertise. Udall v. Tallman, 380 U.S. 1, 16, 85 S. Ct. 792. Accord Zuber v. Allen, 396 U.S. 168, 90 S. Ct. 314. In

this regard the Supreme Court recently declared that while it could not supply a reasoned basis for the agency's action that the agency itself had not given, it would uphold a decision of less than ideal clarity if the agency's path might reasonably be discerned. Bowman Transportation Corporation v. Arkansas-Best Freight Systems, Inc., 95 S. Ct. 438, 443.

The deference which should be given by Courts to administrative agency decisions is heightened when the case involves the construction of a new statute by its implementing agency. This respect is particulary due when the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Power Reactor Development Company v. International Union of Electricians, 367 U.S. 396, 408 (1961) quoting Norwegian Nitrogen Products, Inc. v. United States, 288 U.S. 294 at 315 (1933).

The Agency's interpretation of its responsibilities under both the 1965 Act and the 1972 Act, and the carrying out of those responsibilities has been done reasonably. The Court of Appeals for the District of Columbia in interpreting the 1972 FWPCA in NRDC v. Train, 510 F.2d 692 (1974) at 711 said:

> Where there has been no violation of statutory duty, we think the proper course of action is

> to confine ourselves to a declaration of the intent of Congress and to give the Administrator latitude to exercise his discretion in shaping the implementation of the Act.

The United States Supreme Court reaffirmed this view, allowing EPA discretion in discharging its statutory responsibilities in a Clean Air Act case, Train v. NRDC, 421 U.S. 60, 7 E.R.C. 1735 (1975), at 1744, the Court said:

> We therefore conclude that the Agency's interpretation of §§110(a)(3) and 110(f) was "correct" to the extent that it can be said with complete assurance that any particular interpretation of as complex a statute as this is the "correct" one. Given this conclusion, as well as the fact that the Agency is charged with administration of the Act, and there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency. Udall v. Tallman, 380 U.S. 1, 16-18 (1965); McLaren v. Fleisher, 256 U.S. 477, 480-481 (1921).

The Federal Water Pollution Control Act Amendments of 1972 are no less complex than the Clean Air Act, and EPA acted carefully and reasonably in carrying out its duties under the FWPCA in this case. Our discussion of the facts and law in this case certainly demonstrates that EPA's actions were not arbitrary nor capricious nor contrary to law, and that EPA has reasonably interpreted its statutory responsibilities.

CONCLUSION

For petitioner to prevail in this action, it must overcome not just one, but all of the obstacles which the FWPCA,

the APA, previous Court decisions, logic, and common sense have placed in its path. But as we have demonstrated in our argument, petitioner has not presented a convincing argument to overcome any of the obstacles.

This Court does not have original jurisdiction under Section 509(b)(1)(E) to review the action taken by EPA in its consideration of water quality standards. On this ground alone, this petition should be dismissed.

Secondly, even if this Court once had jurisdiction, petitioner's failure to file within the mandatory, statutory 90-day limit has deprived this Court of jurisdiction. On this ground alone, this petition should be dismissed.

Thirdly, EPA acted reasonably and in accordance with the mandate of the FWPCA in working with the State of New York to secure the development of thermal water quality standards consistent with the Act. Petitioner has not shown any harm that has been inflicted on it resulting from EPA's delay in approving New York's standards. Petitioner's plea for remand on its claim of EPA delay must be denied.

Petitioner does not fare any better when the merits of its claim are considered. The Agency acted well within its discretion in determining not to consider those aspects of the New York thermal submission (Parts 704.4, 704.5 and 704.6) which were not water quality standards as defined under Section 303 of the FWPCA.

Even if the agency had considered Section 704.6 as a water quality standard, it would have been required to disapprove it as inconsistent with the requirements of the Act under Sections 301(b)(1)(C), 303 and 316(a).

Accordingly, it is submitted that the EPA's action in not approving Parts 704.4, 704.5 and 704.6 of New York State's thermal criteria submission as water quality standards must be affirmed.

Respectively submitted,

PETER R. TAFT
Assistant Attorney General

ALFRED T. GHIORZI
PATRICK A. MULLOY
Attorneys, Department of Justice
Washington, D.C. 20530

ROBERT ZENER
General Counsel
Environmental Protection Agency

STEVEN SCHATZOW
Attorney, Environmental Protection Agency
Washington, D.C. 20460

WARREN H. LLEWELLYN
Attorney, Environmental Protection Agency
New York, New York

No. 75-4119

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BETHELEHEM STEEL CORPORATION,

Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents

CERTIFICATE OF SERVICE

I, Patrick A. Mulloy, hereby certify that on this 16th day of April, I mailed, postage prepaid, a copy of the foregoing Brief for Respondents to David K. Floyd, Esquire, Phillips, Lytle, Hitchcock, Blaine & Huber, Attorneys-At-Law, 3400 Marine Midland Center, Buffalo, New York 14203.

PATRICK A. MULLOY
Attorney, Department of Justice
Washington, D.C. 20530

ATTACHMENT I

STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
ALBANY

HENRY L DIAMOND
COMMISSIONER

January 14, 1972

Dear Mr. Hansler:

This concerns previous correspondence as well as conversations with you in Albany on January 5, 1972, relative to New York's thermal criteria.

Confirming our discussions on January 5, we agree that it is best to postpone the holding of any hearings on changes in New York's thermal criteria until pending legislation on the subject in the United States Congress is passed. The latter may render obsolete, all or in part, current federally-approved receiving water quality standards and associated criteria which in turn would indicate that the expense of hearings on any modifications during the next few months would be a wasteful expenditure of funds and other resources.

Sincerely,

Commissioner

Mr. Gerald Hansler
Regional Administrator
Environmental Protection Agency
Region II
26 Federal Plaza
New York, New York 10007

ATTACHMENT II

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND GENERAL COUNSEL

G. S. Peter Bergen, Esquire
LeBoeuf, Lamb, Leiby & MacRae
One Chase Manhattan Plaza
New York, N. Y. 10005

Re: New York State Water Quality Standards

Dear Mr. Bergen:

The Administrator has asked me to respond to your letter of September 14. I have reviewed the letter and the attached copy of a memorandum submitted on behalf of the New York Power Pool to the New York State Department of Environmental Conservation (DEC).

As that memorandum indicates, the Environmental Protection Agency's Regional Administrator, Region II, notified the State of New York on January 17, 1973 of his determination that certain elements of the State's water quality standards were inconsistent with the requirements of the Federal Water Pollution Control Act Amendments of 1972 ("the Act"). The hearings initiated by DEC were intended to consider modifications and revisions to the State standards in order to bring them into conformity with federal law. It is my understanding that, while the hearing themselves have concluded, the DEC is still in the process of evaluating the standards in light of the evidence submitted at the hearings and that no formal decision is expected until the end of October.

While it would be desirable, of course, to have the benefit of the DEC's proposed revisions, this Agency is under a statutory obligation to "promptly prepare and publish proposed regulations setting forth water quality standards" for states which, like New York, have not submitted standards which comply with the Act within the time specified in section 303(a). Accordingly we are proceeding with our review of the state standards and recommended revisions. Once this review is complete, the Agency will publish proposed regulations in accord with section 303(b) of the Act. I shall make sure that you obtain a copy of the proposed regulations as soon as they are published in the Federal Register.

Copy of letter
to be signed by
Zener on Oct 4, 1973
Prepared by & obtained from
Ray McDevitt, OGC - Copy furnished
to Durfee 10/5/73 PBD

1213

Of course, the regulations will contain proposed standards and the Agency will welcome comments from all interested parties. Any comments which are submitted on behalf of the New York Power Pool would receive careful consideration.

Standards relating to maximum temperature increases and thermal mixing zone sizes, however, will not be included in the proposed regulations at this time, since they are receiving further study within the Agency. As I am sure you recognize, disposal of waste heat into our Nation's waterways poses difficult and complex problems. The Agency has established a working group charged with developing uniform guidelines for thermal related water quality standards to supplement those contained in the National Technical Advisory Committee's Report to the Secretary of the Interior. It is hoped that the working group can conclude its deliberations, and proposed guidelines be issued by the Agency, within a matter of weeks.

I thank you for your interest in the Agency and I trust that this information is responsive to your inquiries.

Sincerely,

Robert V. Zener
Acting Deputy General Counsel

ATTACHMENT III

(3)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II
26 FEDERAL PLAZA
NEW YORK, NEW YORK 10007

May 8, 1974

Honorable Malcolm Wilson
Governor of the State of New York
Albany, New York 12224

Dear Governor Wilson:

This is to inform you that I have approved the revised "Classifications and Standards Governing the Quality and Purity of Waters of New York State" (6 NYCRR, Parts 700, 701 and 702) as a portion of the Federal/State water quality standards for the interstate and intrastate waters of New York under the Federal Water Pollution Control Act Amendments of 1972 (the Act). Commissioner Biggane has informed me that these water quality standards were duly adopted by New York State on February 25, 1974 and became effective and enforceable 30 days thereafter as certified by the State Attorney General on April 11, 1974.

In addition, I have conditionally approved the "Classes and Standards of Quality and Purity Assigned to Fresh Surface and Tidal Salt Waters" (6 NYCRR, Parts 800 through 941) as revised and amended on March 31, 1973. This approval is conditioned upon a continuation of the joint State/Federal effort in reviewing the present or potential uses of the approximately 8000 water segments presently classified as Class D, Class SD or Special Class II and in upgrading these use designations where appropriate.

In reviewing the New York Standards, we noted the progressive approach taken by the State in several instances. Among these were the approaches to turbidity, total dissolved solids and potable water supply criteria. I believe that the concepts proposed by New York on these matters may have far-reaching applicability to other States and are, therefore, commendable.

Following this approval, there is only one issue in the water quality standards that remains outstanding. That is the issue of Criteria Governing Thermal Discharges (Part 704). EPA is presently involved with the Department of Environmental Conservation in preparing a mutually acceptable Part 704 regulation, and we expect our efforts to be concluded in the near future.

1075

New York State is to be commended on the thoroughness applied to this standards revision process.

Sincerely yours,

/s/ 5/8/74

Gerald M. Hansler, P.E.
Regional Administrator

cc: James L. Biggane, Commissioner
Department of Environmental Conservation

Eugene Seebald, Director
Division of Pure Waters

ATTACHMENT IV

(4)

STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
ALBANY

Due 12/12/74

JAMES L. BIGGANE
COMMISSIONER

November 18, 1974

Dear Jerry:

On August 8, 1974, I submitted to you copies of Part 704, Criteria Governing Thermal Discharges, which was approved by the State Environmental Board at its July 17, 1974 meeting. Also, I requested your approval of Part 704, expressing the opinion that the revised criteria are in conformance with the Federal Water Pollution Control Act Amendments of 1972 and allow full implementation of Section 316 of the Act.

This is to advise you that Part 704, as well as minor amendments to Parts 700, 701, and 702 were adopted on September 20, 1974, thereafter filed with the Secretary of State, and became effective on October 20, 1974.

Three copies each of Part 700, 701, and 702, Classifications and Standards Governing the Quality and Purity of Waters of New York State; Part 704, Criteria Governing Thermal Discharges; the adoption order for amendments to Parts 700-702; and the adoption order for Part 704 are enclosed.

I request that you approve Part 704 as I requested on August 8, 1974.

Sincerely,

Commissioner

Gerald M. Hansler, P.E.
Regional Administrator
U.S. Environmental Protection Agency
Region II, 26 Federal Plaza
New York, NY 10007

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Enclosures

DOJ-1976-06